



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tracore Development Incorporated

File: B-231774; B-231778

Date: July 20, 1988

DIGEST

1. Where price submitted by sole small business offeror is unreasonable inasmuch as it is twice that of the government estimate, contracting agency had a reasonable basis for cancellation of total small business set-aside solicitation.
2. Claim of possible patent infringement does not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function.

DECISION

Tracore Development Incorporated protests the cancellation of request for proposals (RFP) No. DAAA21-88-R-0080 and the subsequent issuance by the Army Materiel Command (AMC), Picatinny Arsenal, New Jersey, of RFP No. DAAA21-88-R-0189 for a similar research and development effort to design and manufacture military projectiles. Tracore alleges that the solicitation cancellation was improper and that the new solicitation may involve a patent infringement.

We deny the protest in part and dismiss it in part.

The original RFP was issued as a 100-percent small business set-aside on February 5, 1988. Tracore was the only firm to respond to the solicitation. By letter of May 5, the agency informed Tracore that its proposed cost significantly exceeded the funding available for the procurement and, in fact, the record shows that its price was double the government estimate. By the same letter, the solicitation was canceled, and AMC also advised Tracore that the RFP would be reissued on an unrestricted basis. This letter was

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followed by a telephone conversation between representatives of Tracore and the contract specialist on May 9 reiterating the agency's position expressed in the May 5 letter. The new solicitation (DAAA21-88-R-0189) was issued on June 9, on an unrestricted basis, with essentially identical requirements. This protest followed on June 22.

Tracore argues that there was no justifiable reason to cancel the prior solicitation and resolicit on an unrestricted basis. Tracore contends that the agency should have conducted discussions with Tracore, the sole offeror, and disputes the agency's claims of a funding problem, alleging that the contracting officer simply wanted to improperly withdraw the set-aside and subvert the small business set-aside process.

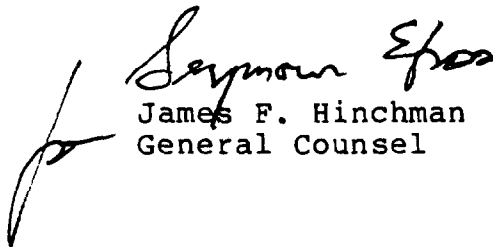
In response, the agency advises that Tracore's proposed costs "were significantly higher than what the government considered to be reasonable."

Federal Acquisition Regulation § 19.506(a) (FAC 84-28) provides that if, before award of a contract involving a set-aside for small business, the contracting officer considers that award to a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw the set-aside determination. Thus, it is not necessary to cancel a small business set-aside simply because only one small business submits an offer, provided, however, that the offer received is reasonable. Otis Elevator Co., B-190432, Mar. 15, 1978, 78-1 CPD ¶ 204. Whether a particular price is unreasonable is for determination by the contracting officer who must analyze the circumstances of each case. Our review is limited to the question of whether the contracting officer acted reasonably in making his determination to cancel. Id. Here, the record shows that Tracore's price was more than double the government estimate. With regard to Tracore's assertion that the Army should have negotiated with Tracore to obtain a lower price, the agency determined that the differential between Tracore's proposal and the government estimate was substantial and that it was unlikely, given the magnitude of the difference, that negotiations would result in a reasonable price without significant reductions in the government requirements. The agency concluded, in our view, reasonably, to seek additional competition. Under these circumstances, we uphold the cancellation on this basis alone. See generally Metric Constructors, Inc.; H. B. Zachry Co., B-229947 et al., Mar. 25, 1988, 88-1 CPD ¶ 311.

Tracore also protests that the reissued RFP includes a drawing of the required projectile which Tracore claims is subject to its patent and that the solicitation should include a factor for patent licenses. However, the agency has never acknowledged that Tracore has a valid patent claim and asserts that an evaluation factor for patent license was therefore not considered necessary.

To the extent Tracore is arguing that other firms may infringe its patent, this contention does not serve as a basis for objection to award. We previously have recognized that 28 U.S.C. § 1498 (1982) gives patent holders an adequate and effective remedy for infringement of their patents, while saving the government from having its procurements delayed pending litigation of patent disputes. American Cyanamid Co., B-230044 et al., Apr. 7, 1988, 88-1 CPD ¶ 350; American Sealcut Corp., B-201573, Apr. 28, 1981, 81-1 CPD ¶ 327. Thus, we have concluded an acquisition may go forward and that all potential sources should be permitted to compete for the contract regardless of a patent infringement allegation. Thus, this allegation does not state a valid basis for protest and is dismissed.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel